U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 17 February 2005

BALCA Case No.: 2003-INA-224
ETA Case No.: P2001-CA-09515276/ML

In the Matter of:

SBC SERVICES,
Employer,

on behalf of

AVIJIT CHATTOPADHYAY,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Kip Evan Steinberg, Esquire
San Rafael, California
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from an application for labor certification[1] filed by SBC Services ("the Employer") on behalf of Avijit Chattopadhyay ("the Alien") for the position of Software Engineer. (AF 23-24).[2] The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for

[1] Alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2] "AF" is an abbreviation for "Appeal File."

review, as contained in the Appeal File ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On May 29, 2001, the Employer filed an application for alien labor certification on behalf of the Alien to fill the position of Senior Analyst (Software Engineer) in a facility in Pleasanton, California.[3] The job duties included design, development, and testing of web-based applications. Minimum requirements for the position were listed as a Master's degree in Computer Science or a related degree. (AF 23-24). The Employer received no applicant referrals in response to its pre-application recruitment efforts. (AF 22). The Employer requested processing under the "reduction in recruitment" procedures. (AF 27).

A Notice of Findings ("NOF") was issued by the CO on December 19, 2002, citing the fact that the Employer had engaged in several layoffs during the time the application had been active, and questioning whether these laid-off workers were qualified U.S. workers able, willing, and available for the job. The CO also questioned whether a current job opening in fact exists. The Employer was instructed to provide the number of workers laid-off from the position of Senior Analyst/Software Engineer, to provide documentation of the consideration given to these laid-off workers for this position, and to provide lawful, job-related reasons for their rejection, if applicable. The Employer was also instructed to list the number of vacancies the Employer has or if a hiring freeze is anticipated due to the layoffs. (AF 19-21).

In rebuttal, the Employer stated that there were no layoffs for the position of Senior Analyst/Software Engineer in the area of intended employment and that they do not have or anticipate any vacancies due to a hiring freeze because of the layoffs. (AF

[3] The Employer, SBC Communications, Inc., is the parent company for Southwestern Bell, Ameritech, Pacific Bell, SBC Telecom, Nevada Bell, SNET, and CellularOne brands. (AF 41).

16-17). The rebuttal states that the Employer still has a position available in its San Ramon, California, job site.

A Supplemental NOF ("SNOF") was issued by the CO on February 21, 2003, citing a media report that states that the Employer announced a layoff of 3,000 employees in California in September 2002. Noting that the ETA 750A only requires a Master's degree in Computer Science or a related degree, but no experience, the CO set forth additional corrective action to "report what efforts you made to refer laid-off employees with a Master's degree in Computer Science (or related) but no experience in this job opportunity." (AF 12-14).

In rebuttal, the Employer reported "[n]one of the laid-off employees had a Master's or Bachelor's degree in Computer Science or a related degree. Therefore, since none of the laid-off workers met the requirements for this position, we made no efforts to refer them to this open position." (AF 10-11). The rebuttal again states that the Employer still has a position available in its San Ramon, California, job site.[4]

A Final Determination ("FD") denying labor certification was issued by the CO on April 22, 2003, based upon a finding that the Employer had failed to conduct an adequate recruitment effort. In denying certification, the CO determined that the Employer's rebuttal was not responsive to the issues raised in the NOF as "you describe both times circumstances in San Ramon when the job is located in Pleasanton, ten miles and a county away." (AF 8-9).

[4] We observe that the attorney's cover letter to this rebuttal submits to the CO that BALCA "does not permit the issuance of multiple Notice[s] of Findings for the same application." This argument is expanded upon in the request for review. In the request for review, the attorney argues that a second or supplemental NOF is only proper in response to an employer's rebuttal. The Board, however, has encouraged COs to use supplemental NOFs if the CO wishes to rely on a new or substantially clarified basis for a proposed denial that arises subsequent to the original NOF *North Shore Health Plan*, 1990-INA-60 (June 30, 1992) (en banc). We are unaware of any ruling by BALCA barring the issuance of second or supplemental NOFs unless in response to a rebuttal. Moreover, we observe that the Employer did not renew this argument in its Brief on Appeal.

The Employer filed a Request for Review by letters dated May 19 and 23, 2003 and this matter was docketed in this Office on July 1, 2003. (AF 1-7). A Brief in Support of Appeal, dated July 28, 2003, was submitted by the Employer.

DISCUSSION

Standard of Review

An abuse of discretion standard of review is employed by BALCA when reviewing a CO's denial of a RIR request. *Solectron Corp*., 2003-INA-144 (Aug. 12, 2004).

Due Process - Whether the CO Improperly Raised a New Issue or Presented New Evidence in the Final Determination

The Employer's brief on appeal characterizes the issue for review as follows:

> This case is about a clerical error and whether it should lead to a denial of an application. The Employer SBC Services, has several job sites within the area of intended employment. In its rebuttals, SBC Services made a clerical error and incorrectly responded that the job site was at one of its San Ramon, California facilities instead of its Pleasanton, California facility. The two cities are approximately ten miles apart and both within the same area of intended employment.

(Employer's brief at 1). The Employer then invokes the rule that it is a denial of due process for the CO to deny an application on grounds not raised in the Notice of Findings. *North Shore Health Plan*, 1990-INA-60 (June 30, 1992) (en banc).[5]

[5] In support of this argument, the Employer characterizes the ruling in *Nancy Johnstone*, 1987-INA-541 (May 31, 1989) (en banc), as "When an employer makes an error in its rebuttal, a second notice of findings is the proper forum to cure the defect." This is an overly broad interpretation of *Johnstone*, which does not stand for the proposition that whenever an employer makes an error in rebuttal, a new NOF is required. Rather, in *Johnstone* the Board found that the NOF was unclear and confusing, leading the Employer to

Undoubtedly, the CO's raising of the fact that the Employer's rebuttal referred to the wrong facility took the Employer by surprise. But an Employer's surprise that it made a mistake in its rebuttal cannot be equated with a denial of due process by the CO for pointing out the mistake and basing a Final Determination on that mistake. In such a circumstance the CO cannot be said to have improperly raised a new legal theory or introduced new evidence for the first time in the Final Determination. Rather, in the instant case the CO was analyzing the credibility of the Employer's rebuttal responses, and simply found that the responses spoke to a position in San Ramon rather than Pleasanton. This is not the raising of a new issue or evidence but merely stating the reason for rejecting the rebuttal. Obviously if a new NOF was necessary any time a CO rejects, or finds not credible, an assertion made in the Employer's rebuttal documentation, it would be enormously difficult for a CO to ever bring a case to closure. We therefore find that the CO did not violate procedural due process by basing the Final Determination on the Employer's mistake in its rebuttal, at least insofar as the CO was thereby denying the RIR request (although, as discussed below, it was error for the CO to deny the application outright at this stage in the procedure).

Whether the Employer's Rebuttal Was In Fact Responsive to the NOFs Notwithstanding the Error in Referencing the Wrong Work Site

The Employer also argued that the CO's Final Determination should be reversed because its rebuttal was responsive to the NOF, even though it mistakenly referenced the wrong city, and because technical denials are disfavored. Specifically, the Employer asserts that the CO erred in determining that the rebuttals were not responsive as to the proper geographic area of inquiry under 20 C.F.R. § 656.24(b). Citing the *Statistical Abstract of the United States: 2002, Appendix II*, page 915, the Employer asserted that the Federal Office of Management and Budget has placed both Alameda and Contra Costa counties, where San Ramon and Pleasanton are located, in the same Primary Metropolitan Statistical Area ("PMSA") of Oakland, California. Citing *Urban and Land*

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misunderstand what was to be rebutted. In the instant case, the NOF did not mislead the Employer. *Johnstone*, therefore is inapposite.

Use Economics, Dartmouth College, the Employer noted that a PMSA is defined in part as "one or more counties that have *substantial commuting interchange*," and that the Oakland PMSA is the one used by the Labor Market and Information Division of the Employment Development Department of California to determine the prevailing wage for the application. The Employer further notes that in its rebuttal, it specifically stated that "there have been no layoffs for the occupation of Senior Analyst/Software Engineer in the area of intended employment." The Employer thus asserts that its answers were responsive to the issue raised by the CO even though the rebuttal mistakenly referred to the work site as San Ramon instead of Pleasanton.[6]

With the Employer's additional explanation as presented in the request for review and appellate brief, it appears that the CO's focus on the reference to the wrong facility in the two rebuttals resulted in his overlooking the fact that the Employer's rebuttal, in effect, covered both the San Ramon and Pleasanton areas. Moreover, it appears that the Employer's reference in the rebuttal to the wrong location of the offered position was a genuine mistake rather than an attempt to mislead the CO. It is certainly understandable that the CO ruled the way he did in view of the mistaken reference in the rebuttals to the wrong facility. However, the CO has the authority to overlook harmless errors in labor certification applications. *See* 20 C.F.R. § 656.24(b)(1); *see also J. Michael & Patricia Solar*, 1988-INA-56 (Apr. 6, 1989)(*en banc*) (denials of labor certification on purely technical grounds are not favored). Although it is a borderline case because it is only with the Employer's clarification that the matter becomes evident, we find that it would be an abuse of discretion not to look beyond the Employer's error in identification of the work site to consider whether its overall rebuttal was, in fact, responsive to the NOF. Thus, we will remand the case to the CO to reconsider whether the Employer's rebuttals established entitlement to an RIR.

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[6] There is no indication in the record that the Employer requested that the CO reconsider the Final Determination based on its contention that the rebuttal response covered the entire area of intended employment, and therefore the reference to San Ramon instead of Pleasanton was harmless error. We observe that this is precisely the type of issue that may be most expeditiously handled by reconsideration rather than an appeal to this Board.

Whether the CO is Limited to Considering Jobs in the "Area of Intended Employment" When Considering Whether to Grant an RIR

We observe that the Employer's rebuttal and argument in this case includes an untenable assumption that the CO's analysis of layoffs should have been confined to the "area of intended employment." In this respect, the Employer cited 20 C.F.R. § 656.24(b). The regulation at section 656.24(b), however, does not limit a CO's authority to look beyond the immediate geographic location of the work site. Rather, in determining whether a U.S. worker is available at the place of the job opportunity, the CO

> may also consider U.S. workers who are willing to move from elsewhere to take the job at their own expense, or, if the prevailing practice among employers employing workers in the occupation in the area of intended employment is to pay such relocation expenses, at the employer's expense.

20 C.F.R. § 656.24(b)(2)(iv). Thus, when considering an RIR request by an employer which has engaged in layoffs, the CO is authorized to ask whether the employer looked beyond the "area of intended employment" for workers willing to move. Where the Employer has laid-off numerous workers at other facilities owned by the employer, we see no reason why the CO could not inquire into the availability of laid off employees in geographically diverse locations who may be willing to move, especially when the case is in the posture of an RIR request. *See also Compaq Computer Corp*., 2002-INA-249 et al (Sept. 3, 2003) (RIR may be denied when an employer who has laid off workers does not address the potential availability of workers from other locations). Because the grant or denial of an RIR is a matter within the CO's discretion, a CO is not obligated to inquire beyond the immediate geographic area -- but we hold that the CO is not precluded from inquiring into whether the Employer gave consideration to laid off workers from other locations.

Moreover, we have carefully reviewed the CO's two NOFs and do not find any statement therein limiting the request for information about layoffs to the "area of intended employment," which appears to be a limitation the Employer imposed itself.

Rather, the CO's questions were about laid off workers who were qualified for the position for which labor certification is sought, with no geographical limitation stated. The CO specifically observed in the second NOF that press reports indicated that the Employer had recently announced a layoff of 3,000 employees in California. The CO, therefore, may have been concerned about more than the Employer's layoffs in the immediate area of intended employment.

Thus, on remand, the CO may require the Employer to provide additional information about its layoffs in other geographical areas and whether any consideration had been given in the pre-application recruitment to whether there were qualified applicants who were willing to move, either at their own expense or at the Employer's expense if the prevailing practice in the area of intended employment is for employers to pay such expenses for Software Engineers.

Whether the CO May Deny the Application Outright if the RIR is Denied

In *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003), this panel held that when the CO denies an RIR, such a denial should result in the remand of the application to the local job service for regular processing. Subsequent to *Compaq Computer,* however, this panel recognized a couple of exceptions to the remand rule: (1) where the employer fails to comply with a deadline set by the CO for responding to the CO's inquiries about the RIR request, *Houston's Restaurant*, 2003-INA-237 (Sept. 27, 2004), and (2) where the application is so fundamentally flawed that a remand would be pointless, such as where the application did not present a bona fide job opportunity. *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004).

In the instant case, the CO did not simply deny the RIR and remand for supervised recruitment, but rather denied labor certification outright. He did not explain in the Final Determination why he had the authority to do this.

We observe that the first NOF gives the Employer the option to re-recruit, but requires, if this option is chosen, a statement of willingness to retest the labor market and a draft advertisement. (AF 20-21) The first NOF also states: "If you chose not to recruit or give no justification for using an alternative source of recruitment, we shall consider that you have not adequately tested the labor market and will deny your petition." Possibly, this is the grounds on which the CO believed he had the authority to decide the application on the merits rather than remand to the local job service for regular processing.

While we empathize with a CO's attempt to streamline processing, in this case we find that the NOF did not provide adequate notice to the Employer that, if the RIR was denied, a remand for regular recruitment would be denied if the Employer had not provided a statement of willingness to readvertise and a draft advertisement. Because we base this determination on lack of notice, we do not reach the question of whether a CO overreaches if he or she imposes conditions on remands that are otherwise a matter of right under the regulations when an RIR is denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and this matter is **REMANDED** for further proceedings consistent with the above.

For the panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions

for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.